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SOVEREIGN EARTH SDN BHD

v.

MALAYSIAN MARITIME & DREDGING CORPORATION SDN BHD

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HIGH COURT MALAYA, KUALA LUMPUR
AZIAH ALI J
[CIVIL SUIT NO: S2-22-498-2008]
25 AUGUST 2008

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CIVIL PROCEDURE: *Injunction - Interim injunction, application for - Injunction to restrain defendant from acting in breach of contract - Whether plaintiff's loss monetary in nature and could be adequately compensated by damages - Whether grant of an injunction would cause*

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greater injustice to defendant - Project to alleviate flood problems - Whether imperative that project be allowed to be carried out - Public interest overrode dispute between plaintiff and defendant - Failure of plaintiff to show persuasive reasons for court to grant mandatory and prohibitory injunctions - Balance of convenience - Whether lay against granting of interim injunction

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The plaintiff's claim against the defendant was for breach of two contracts (i) the dumping contract and (ii) the dredging contract. By way of encl. 1, the plaintiff sought, *inter alia*, orders for specific performance of the dumping contract; an injunction to restrain the defendant from acting in breach of the said contract and an order for the defendant to comply with the said contract; a declaration that there was a valid contract dated 27 November 2007 (the dredging contract) between the plaintiff and the defendant and an order for specific performance of the said contract; an injunction to restrain the defendant and/or its agents from acting in breach of the said contract and damages for breach of contract in *lieu* of or in addition to specific performance. The background facts were that the defendant was awarded a contract by the Jabatan Pengairan Dan Saliran Malaysia (JPS) in respect of a project known as 'Merekabentuk dan Membina Kerja-Kerja Pembaikan Muara Sungai Johor di Daerah Kota Tinggi, Johor' ('the project'). The purpose of the project was to alleviate the problems that plagued the residents of the district of Kota Tinggi due to the floods. Pursuant to this the defendant received offers from owners of land situated in the vicinity of the project and among those who offered their land to be used as sites for dumping the dredged materials were the plaintiff and a company known as SBB

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Construction Sdn Bhd ('SBB'). The defendant issued a letter of award dated 1 October 2007 to the plaintiff, which the plaintiff accepted, to enable the defendant to obtain rights to discharge, dispose and dump 2,000,000 cubic metres of dredged materials on dumping sites provided by the plaintiff. The defendant had made two payments to the plaintiff and was in the process of evaluating the plaintiff's third claim for payment when the defendant received a letter from the plaintiff alleging breach of the dumping contract by the defendant and claiming loss and damages in the sum of RM20,000,000. It was the plaintiff's contention that cl. 2 of the dumping contract showed that the dredged materials from the whole project was contracted to the plaintiff and the dumping contract was exclusive to the plaintiff. The plaintiff stated that the defendant had breached the dumping contract by entering into a contract with SBB to dump the dredged materials from the project on sites provided by SBB. With regard to the dredging contract, the plaintiff averred that the defendant had appointed the plaintiff to carry out dredging works at the project site. The plaintiff stated that although they had accepted the dredging contract, the defendant had given notice of revocation of the said contract which was unlawful and void and too late as the contract had been accepted, signed, stamped and acceptance had been communicated to the defendant. The plaintiff claimed that the actions of the defendant had caused damage and loss to the plaintiff. According to the plaintiff, the balance of convenience should lie in favour of the plaintiff and that the granting of the injunction was merely to prevent the defendant from breaching the contracts. The defendant, however, contended that there was only one concluded contract between the parties *ie* the dumping contract. However, the defendant submitted that it was at liberty to enter into similar contracts with other parties for the remainder of the dredged materials and thus the appointment of another contractor was not a breach of the contract. As for the dredging contract, the defendant denied that such a contract was concluded between the parties. According to the defendant, the plaintiff had disagreed with terms offered in the letter of award and due to the plaintiff's non-acceptance of the terms offered, the defendant had revoked its offer. The defendant disputed the plaintiff's allegation that if an injunction was not granted, the substratum of the contract would be destroyed. According to the defendant, an injunction in the terms applied for by the plaintiff would cause dire consequences to the progress of the project and the public and therefore, an injunction should not be granted.

Held (dismissing plaintiff's application with costs):

(1) There were serious issues herein which merit further investigation. The defendant had not denied its contractual obligations to dump a certain amount of cubic metres of dredged materials onto the plaintiff's sites. Progress payments were being made. Losses related to the dumping contract, if any, would be the plaintiff's loss of proceeds from the sale of the balance of the cubic metres of the approximately 2.9 million cubic metres of dredged material from the whole project. Such loss could be quantified. The plaintiff's financial loss, if any, would be monetary in nature and could be adequately compensated by damages. The court would decline to grant an injunction where monetary compensation was an adequate remedy. (para 30)

(2) If an injunction was granted there was a possibility of disruption of work. The losses suffered by the defendant would be greater. The defendant would sustain damage from any disruption or delay in the project works. Such losses and damage may be more than what the plaintiff would sustain if an injunction was refused. It was imperative that the defendant be allowed to carry out its contractual obligations with JPS without disruptions. The grant of an injunction would cause greater injustice to the defendant. (para 30)

(3) The said project was to alleviate the flood problems that had occurred in the Kota Tinggi district which had caused much suffering, inconvenience and financial loss to the public affected by the floods. It was imperative that this project be allowed to be carried out and works to proceed unhindered till completion. Therefore, the defendant had to be allowed to carry out its contractual obligations with JPS and to proceed with the completion of the project according to schedule. Such interest overrode the dispute between the plaintiff and the defendant. (para 33)

(4) The balance of convenience lay against the granting of the interim injunction. The plaintiff had failed to show persuasive reasons for the court to grant the mandatory and prohibitory injunctions sought for. This court exercised its discretion in favour of the defendant. (para 35)

Case(s) referred to:

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 SC ***(refd)***

Aramin Sdn Bhd v. Juta Rasmi (M) Sdn Bhd [2005] 2 CLJ 620 HC ***(refd)***

Bandar Raya Developments Berhad v. Ang Yoke Lin Construction Sdn Bhd [1993] 2 CLJ 53 HC ***(refd)***

Datuk Bandar Kuala Lumpur v. Abdul Aziz Mohamed Ginan & Ors [2007] 3 CLJ 399 CA ***(refd)***

ESPL (M) Sdn Bhd v. Radio & General Engineering Sdn Bhd [2004] 4 CLJ 674 CA ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor & Ors [1995] 1 CLJ 293 CA ***(refd)***

Kilang Kosfarm Sdn Bhd v. Kosma Nusantara Bhd (No 2) [2002] 3 CLJ 165 HC ***(refd)***

Larut Consolidated Bhd & Anor v. Khoo Ee Bee & Ors [1997] 5 CLJ 307 HC ***(refd)***

Lum Choon Realty Sdn Bhd v. Perwira Habib Bank Malaysia Bhd [2003] 3 CLJ 791 CA ***(refd)***

Major Indah Sdn Bhd v. Homeng Realty Sdn Bhd [2000] 1 LNS 67 ***(refd)***

Marina Mohd Yusoff v. Pekeliling Triangle Sdn Bhd & Other Appeals [2008] 1 CLJ 169 CA ***(refd)***

MBf Holdings Berhad v. East Asiatic Company (Malaysia) Berhad [1995] 4 CLJ 73 HC ***(refd)***

Natseven TV Sdn Bhd v. Television New Zealand Ltd [2001] 4 CLJ 722 HC ***(refd)***

Palmerston Holdings Sdn Bhd v. Chong Siew Eng [2007] 7 CLJ 56 HC ***(refd)***

Pekeliling Triangle Sdn Bhd & Anor v. Chase Perdana Bhd [2003] 1 CLJ 153 CA ***(refd)***

Perbadanan Setiausaha Kerajaan Selangor & Ors v. Metroway Sdn Bhd & Anor & Another Appeal [2003] 3 CLJ 339 CA ***(refd)***

Petronas Dagangan Sdn Bhd v. Omar Abdul Samad [1995] 1 LNS 318 ***(refd)***

Public Textiles Berhad v. Lembaga Letrik Negara [1976] 1 LNS 120 ***(refd)***

See Teow Guan & Ors v. Liquidators of Kian Joo Holdings Sdn Bhd (In Liquidation) & Ors [2008] 1 CLJ 218 CA ***(refd)***

Sivaperuman v. Heah Seok Yeong Realty Sdn Bhd [1978] 1 LNS 184 ***(refd)***

SV Beverages Holdings Sdn Bhd & Ors v. Kickapoo (Malaysia) Sdn Bhd [2008] 4 CLJ 20 CA ***(refd)***

Television Broadcasts & Ors v. Seremban Video Centre Sdn Bhd [1984] 1 CLJ 196; [1984] 2 CLJ (Rep) 535 HC ***(refd)***

Tenaga Nasional Bhd v. Dolomite Industrial Park Sdn Bhd [2000] 1 CLJ 695 CA ***(refd)***

The Ka Wah Bank Ltd v. Nadinusa Sdn Bhd & Anor [1998] 2 CLJ 486 FC ***(refd)***

A *Tien Ik Sdn Bhd & Ors v. Peter Kuok Khoon Hwong [1993] 1 CLJ 9 SC* ***(refd)***

Timbermaster Timber Complex (Sabah) Sdn Bhd v. Top Origin Sdn Bhd [2002] 1 CLJ 566 CA ***(refd)***

B *For the plaintiff - Kee Kong Tiak; M/s Chee Siah Le Kee & Partners*
For the defendant - Sabarina Samadi (Helmi Hamzah with her); M/s Hisham, Sobri & Kadir

Reported by Suhainah Wahiduddin

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JUDGMENT

Aziah Ali J:

D **[1]** The plaintiff's claim against the defendant is for breach of two contracts dated 1 October 2007 (hereinafter referred to as the "Dumping Contract") and the other dated 21 November 2007 (hereinafter referred to as the "Dredging Contract"). By way of encl. 1 the plaintiff seeks *inter alia* orders for specific performance of the Dumping Contract dated 1 October 2007, an injunction to E restrain the defendant from acting in breach of the said contract and an order for the defendant to comply with the said contract; a declaration that that there is a valid contract dated 27 November 2007 (the Dredging Contract) between the plaintiff and the defendant and an order for specific performance of the said F contract, an injunction to restrain the defendant and/or its agents from acting in breach of the said contract and damages for breach of contract *in lieu* of or in addition to specific performance.

[2] Pending the disposal of encl. 1, *vide* encl. 3 the plaintiff G applied for and obtained an *ex parte* interim injunction against the defendant in the following terms:

> (a) suatu perintah injunksi untuk menghalang Defendan sama ada secara sendiri dan/atau melalui pengkhidmatnya dan/atau ejennya atau sebagaimana sebaliknya dari membuang pasir H dan bahan-bahan korekan lain bagi projek "merekabentuk dan membina kerja-kerja pembaikan muara Sungai Johor di Daerah Kota Tinggi, Johor" ke tapak pembuangan pihak ketiga termasuk tetapi tidak terhad kepada tapak pembuangan yang disediakan oleh SBB Construction Sdn Bhd;

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(b) suatu perintah bahawa Defendan hendaklah membuang pasir dan bahan-bahan korekan lain bagi projek tersebut di tapak Plaintif dan/atau menyebabkan (cause) pengkhidmatnya dan/atu ejennya dan/atau kontraktor kecilnya untuk berbuat demikian;

(c) suatu perintah injunksi untuk menghalang Defendan sama ada secara sendiri dan/atau melalui pengkhidmatnya dan/atau ejennya atau sebagaimana sebaliknya dari menjalankan kerja-kerja pengorekan di Blok 2, 3 dan 9 projek tersebut.

The three prayers of encl. 3 above are similar in terms with prayers (b), (d) and (g) of encl. 1. The plaintiff gave the following grounds for making this application:

1. Defendan telah memungkiri perjanjian pembuangan yang bertarikh 1.10.2007 dengan Plaintif dengan membuang pasir dan bahan-bahan korekan yang lain ke tapak yang disediakan oleh SBB Construction Sdn Bhd;

2. Defendan telah memungkiri perjanjian pengorekan yang bertarikh 21.11.2007 dengan Plaintif dengan secara salah membatalkan perjanjian pengorekan tersebut, menghalang Plaintif daripada menjalankan kerja-kerja pengorekan di bawah perjanjian pengorekan tersebut dan menjalankan kerja-kerja pengorekan dengan sendiri dan/atau melalui pengkhidmatnya dan/atau ejennya menjalankan kerja-kerja pengorekan di Blok 9 dan menjalankan kerja-kerja penyediaan untuk mengorek di Blok 2 dan 3 yang seharusnya dijalankan oleh Plaintif di bawah perjanjian pengorekan tersebut; dan

3. Imbangan keselesaan memihak kepada Plaintif dan pampasan bukan ganti rugi yang memadai bagi Plaintif.

[3] Pursuant to the granting of the *ex parte* injunction, the defendant filed an application to set it aside (encl. 10). On 13 May 2008 encl. 10 was allowed with costs and the *ex parte* injunction was set aside. After the *inter partes* hearing I dismissed the application encl. 3 with costs. The plaintiff now appeals against this decision and against my decision to exclude the affidavit dated 3 June 2008 affirmed by Chok Siew Moi.

Background Facts

[4] The background facts as ascertained from the defendant's affidavit encl. 16 shows that in August 2007 the defendant was awarded a contract (encl. 16 "ED1") by the Jabatan Pengairan Dan Saliran Malaysia (JPS) in respect of a project known as

"Merekabentuk dan Membina Kerja-Kerja Pembaikan Muara Sungai Johor di Daerah Kota Tinggi, Johor" (the project). The defendant says that the project is a government project implemented pursuant to the floods that occurred in December 2006 and January 2007 in the district of Kota Tinggi. The purpose of the project is to alleviate the problems that plagued the residents of the district of Kota Tinggi due to the floods. Part of the works involved the dredging of the Johore river and the dredged materials has to be dumped at sites along the banks of the Johore river. It is estimated that the total amount of dredged material from the project is approximately 2,909,394 cubic metres. Pursuant to this the defendant received offers from owners of land situated in the vicinity of the project and among those who offered their land to be used as sites for dumping the dredged materials were the plaintiff and a company known as SBB Construction Sdn Bhd ("SBB").

[5] The defendant issued a letter of award dated 1 October 2007 to the plaintiff, which the plaintiff accepted, to enable the defendant to obtain rights to discharge, dispose and dump 2,000,000 cubic metres of dredged materials at RM0.60 per cubic metre on dumping sites provided by the plaintiff (the 'Dumping Contract' at encl. 2 "SE1"). The plaintiff sold the dredged materials to third parties at approximately RM10 per cubic metre. The defendant has made two payments to the plaintiff and is in the process of evaluating the plaintiff's third claim for payment. However on 31 January 2008 the defendant received a letter from the plaintiff's solicitors alleging breach of the Dumping Contract by the defendant and claiming loss and damages in the sum of RM20,000,000. This was denied by the defendant through their solicitor's letter dated 22 February 2008 (encl. 16 'ED6').

Plaintiffs' Case

[6] The plaintiff contends that cl. 2 of the Dumping Contract shows that the dredged materials from the whole project is contracted to the plaintiff and the Dumping Contract is exclusive to the plaintiff. The plaintiff states that they have made available the dumping sites and the defendant and/or their servants and/or agents had commenced dumping the dredged materials at the plaintiff's sites. The plaintiff states that on 17 December 2007 the defendant has breached the Dumping Contract by entering into a contract with SBB to dump 200,000 cubic metres of dredged materials from the project on sites provided by SBB. By letters

dated 18 December 2007, 21 February 2008 and 28 February 2008 the plaintiff protested the defendant's acts of dumping the dredged materials on SBB's sites and of allowing SBB and/or third parties to remove the dredged materials. The plaintiff also lodged a police report (encl. 2 "SE8"). The plaintiff claims that the defendant's actions has caused the plaintiff to lose the right to dispose off the dredged materials that should have been dumped on their sites.

[7] With regard to the Dredging Contract, the plaintiff avers that *vide* a letter dated 21 November 2007 the defendant had appointed the plaintiff to carry out dredging works at Block 2, Block 3 and Block 9 of the project site (the 'Dredging Contract' at encl. 2 "SE2"). The plaintiff says they had accepted the award and signed the letter and had sent the stamped copy of the original to the defendant at the defendant's site office on 5 December 2007 and the defendant had acknowledged receipt (encl. 2 "SE3"). The plaintiff states that although they had accepted the Dredging Contract on 5 December 2007, on 10 December 2007 the defendant gave notice of revocation of the said contract (see encl. 2 "SE11" or encl. 16 "ED10").

[8] On 17 December 2007 the plaintiff was informed by the defendant's project manager that the plaintiff is not allowed to continue with dredging works as the contract had been terminated by the defendant. On the same date (17 December 2007) the plaintiff again delivered to the defendant the plaintiff's letter dated 5 December 2007 ("SE3") and the original copy of the Dredging Contract which the plaintiff said was stamped on 30 November 2007. The plaintiff says that the defendant refused to acknowledge that they had received the plaintiff's letter dated 5 December 2007 ("SE3") on the same date and maintained that they had received the said contract only on 17 December 2007 ie, after the date of the notice of revocation. The plaintiff was informed that on 29 December 2007 that the defendant's project engineer and two others had barred the plaintiff's workers from carrying out dredging works. Subsequently there was an exchange of correspondence between the solicitors for the plaintiff and the defendant (encl. 2 "SE14"). The defendants and/or their agents have started dredging works in Block 9 and have started preparatory works on Blocks 2 and 3, works which the plaintiff says should be carried out by them.

[9] The plaintiff says the revocation of the Dredging Contract is unlawful and void and too late as the contract had been accepted, signed and stamped and a copy returned to the defendant on 5 December 2007. The acceptance had been communicated to the defendant before the revocation. The plaintiff says they had commenced preparatory works such as building access roads, clearing the land in Blocks 2, 3 and 9 that are to be used as the dumping sites, transporting sand dredging barge to the dredging site and had ordered 'bucket dredgers' from China and Indonesia. The defendant had been notified of the works undertaken by the plaintiff. The plaintiff claims that the actions of the defendant has caused damage and loss to the plaintiff.

[10] Counsel for the plaintiff submits that there are serious issues to be tried ie, whether under the Dumping Contract the whole project had been contracted to the plaintiff; whether the defendant has breached the said contract; whether the defendant had wrongfully revoked the Dredging Contract and whether the defendant has breached the said contract by disallowing the plaintiff's workers from carrying out work under the Dredging Contract.

[11] Counsel submits that if an injunction is not granted then the whole substratum of the contract will be destroyed as the plaintiff will not know the nature of the dredged materials. Counsel submits that it is important for the plaintiff to know not only the volume but also the nature of the dredged materials because the plaintiff's sale price of the dredged materials to third parties will depend on whether it is mud, which is of no value, or sand which the plaintiff can sell at RM10 per cubic metre. If the sand is washed then the plaintiff can sell it at a higher price. Counsel submits that if the injunction is not granted then the plaintiff will lose the opportunity to do the work and to sell the dredged materials to third parties. It is further submitted that the granting of the injunction will not prejudice the defendant as the unit price under the Dumping Contract is lower than the price under the plaintiff's contract with SBB. In fact counsel says the plaintiff will save by continuing the contract with the plaintiff and the issue of delay of the project will not arise.

[12] Counsel submits that damages will not be an adequate remedy as the plaintiff is claiming for specific performance, for accounts and for a declaration. Further, counsel says that the plaintiff needs to know the volume of dredged materials dumped

on the plaintiff's site as the contract price depends on the volume. The plaintiff also needs to know the nature of the materials dumped in order to know how much the plaintiff can make from the sale of the dredged materials. Counsel contends that under the contract the plaintiff has the right to dispose off the dredged materials. Therefore the plaintiff says that without knowing the nature of the dredged material to be dumped at the plaintiff's sites, damages will be difficult to assess (*Television Broadcasts & Ors v. Seremban Video Centre Sdn Bhd* [1984] 1 CLJ 196; [1984] 2 CLJ (Rep) 535). Hence it is submitted that the amount due to the plaintiff is not just the amount payable for 2,000,000 cubic metres of dredged materials under the Dumping Contract but also the proceeds from the sale of the dredged materials to third parties. The plaintiff further contends that the amount of dredged material contracted to the plaintiff is for the whole project and not limited to the 2,000,000 cubic metres.

[13] Counsel submits that the balance of convenience lies in favour of the plaintiff and that the granting of the injunction is merely to prevent the defendant from breaching the contracts (*Major Indah Sdn Bhd v. Homeng Realty Sdn Bhd* [2000] 1 LNS 67) and that damages may not be an adequate remedy even where payment of damages is provided for under the contract (*Keet Gerald Francis Noel John v. Mohd Noor & Ors* [1995] 1 CLJ 293). Counsel further submits that in this case because of the plaintiff's loss of the right to dispose off the dredged material, the damages run daily thus making it difficult to assess (*Bandar Raya Developments Berhad v. Ang Yoke Lin Construction Sdn Bhd* [1993] 2 CLJ 53). Therefore this application is in aid of the relief of specific performance of the Dumping Contract to prevent the defendant from dumping the dredged materials elsewhere. Counsel submits that if injunctive relief is not granted then by the time trial of this action commences there will be no more materials to be dumped and the relief of specific performance sought for will be academic. In respect of the Dredging Contract counsel reiterates that the revocation was done after there had been acceptance and the acceptance had been communicated to the defendant.

[14] The plaintiff acknowledges that this project is a public interest project but contends that the granting of the injunction does not have any effect on the project because what the plaintiff is asking for is for the defendant to continue with the dredging work and to dump the dredged material on the plaintiff's dumping

A sites. The plaintiff is also asking for an order for the plaintiff to carry out dredging work. There is no intention to cause delay or stoppage of the progress of the project.

[15] On the issue of undertaking counsel submits that it is B irrelevant since the hearing is at *inter partes* stage (*Petronas Dagangan Sdn Bhd v. Omar bin Abdul Samad* [1995] 1 LNS 318). Alternatively the plaintiff is prepared to give an undertaking as it has the capacity to pay damages as its paid up capital is RM500,000. The value of the Dumping Contract for 2,000,000 C cubic metres of material is RM1.2 million and it expects payments from the defendant on its progressive claims with approximately RM618,178.15 still due. Therefore counsel urged the court to dispense with the undertaking.

D **Defendants' Case**

[16] For the defendant it is contended that there is only one concluded contract between the parties ie, the Dumping Contract. However the defendant denies that the contract is exclusive to the plaintiff or that the plaintiff has exclusive rights to the dredged E materials recovered from the whole project. The estimated amount of dredged material from the project is approximately 2,909,394 cubic metres out of which the defendant is contracted to dump 2,000,000 cubic metres onto the plaintiff's dumping sites. Counsel submits that parties are bound by the four corners of the contract F and by the express terms of the contract the plaintiff is not given rights to all the dredged materials from the whole project. Therefore it is submitted that the defendant is at liberty to enter into similar contracts with other parties for the remainder of the dredged materials and thus the appointment of another contractor G is not a breach of the contract. Counsel further submits that the appointment of another contractor was necessitated by the plaintiff's failure to perform its obligations under the Dumping Contract (encl. 16 paras 55 to 59) which affected the project works. It is submitted that the project works are progressing at a H rate well in advance of the scheduled progress rate and any injunction will severely hamper the rate of progress achieved by the defendant.

[17] Counsel submits that the plaintiff's interest is merely the I dredged materials which they sell at RM10 per cubic metre. Counsel further submits that the defendant is not involved with post dumping works and is not concerned with the steps taken

by the plaintiff in relation to the disposal of the dredged materials. The defendant has paid for and is in the process of paying the plaintiff. The monies due under the Dumping Contract is not an issue. Therefore counsel submits that what sums are owed to the plaintiff and what the plaintiff can get from the sale of the dredged materials are not in issue (*Natseven TV Sdn Bhd v. Television New Zealand Ltd* [2001] 4 CLJ 722).

[18] With regard to the Dredging Contract, the defendant denies that such a contract was concluded between the parties. Counsel submits that there was no clear and unequivocal acceptance of the terms by the plaintiff. According to the defendant the plaintiff disagreed with the terms offered in the letter of award and incorporated a counter offer in their letter (encl. 16 "ED8" and "ED9"). The defendant states that a counter offer by the plaintiff is not an acceptance (*The Ka Wah Bank Ltd v. Nadinusa Sdn Bhd & Anor* [1998] 2 CLJ 486). According to the defendant due to the plaintiff's non acceptance of the terms offered and their counter offer, the defendant revoked its offer *vide* the letter dated 10 December 2007 (encl. 16 "ED10"). The defendant submits that the plaintiff is estopped from denying that they had rejected the letter of award (*Public Textiles Berhad v. Lembaga Letrik Negara* [1976] 1 LNS 120).

[19] The defendant disputes the plaintiff's contention that it received the plaintiff's purported acceptance on 5 December 2007 as claimed by the plaintiff. The defendant disputes the veracity of the defendant's rubber stamp acknowledging receipt as appearing on the plaintiff's letter dated 5 December 2007 ("SE3") and alleges that the said stamp is a forgery as it is not the usual shape of the defendant's stamp of acknowledgment of receipt (see the defendant's stamp appearing on "SE3" and the stamp appearing on "SE10", "SE12", "SE13"). The defendant maintains that it received the plaintiff's letter on 17 December 2007 ie, after the notice of revocation was issued.

[20] Counsel disputes the plaintiff's allegation that if an injunction is not granted, the substratum of the contract will be destroyed. According to counsel the Dumping Contract is in existence and payments are being made to the plaintiff. The plaintiff's main concern is in relation to the dredged materials. So there is no issue of destruction of the substratum of the contract. The contract has stipulated that the dredged materials to be dumped onto the plaintiff's sites is approximately 2,000,000 cubic metres. Therefore

A if at all there is a breach the amount is quantifiable and it will be a maximum of RM1.2 million. It is also submitted that the defendant is not concerned with the sale of the dredged materials by the plaintiff to third parties as this is not within the scope of the contract. Further counsel submits that there is no clause in B the contract which provides for specific performance and therefore the plaintiff cannot ask for such relief (*Palmerston Holdings Sdn Bhd v. Chong Siew Eng* [2007] 7 CLJ 56).

[21] Counsel submits that there are no serious issues to be tried C and even if there are, injunctive remedy should be declined as damages would be adequate remedy (*Pekeliling Triangle Sdn Bhd & Anor v. Chase Perdana Bhd* [2003] 1 CLJ 153). Counsel submits that the project is already 76.79% completed. An injunction in the terms applied for by the plaintiff will cause dire consequences to D the progress of the project and the public. Therefore an injunction should not be granted (*Datuk Bandar Kuala Lumpur v. Abdul Aziz Mohamed Ginan & Ors* [2007] 3 CLJ 399).

[22] On the question of balance of convenience counsel submits E that this is a case of breach of contractual obligations for which damages is adequate compensation. No irreparable damage will be caused to the plaintiff's claim is merely for damages and as such an injunction is not an appropriate remedy (*Kilang Kosfarm Sdn Bhd v. Kosma Nusantara Bhd (No 2)* [2002] 3 CLJ 165 and *Perbadanan Setiausaha Kerajaan Selangor & Ors v. F Metroway Sdn Bhd & Anor & Another Appeal* [2003] 3 CLJ 339).

[23] Counsel for the defendant raised the failure of the plaintiff to make a full and frank disclosure to the court at the time of applying for the *ex parte* injunction. The plaintiff had failed to G inform the court that the letter of award from JPS to the defendant had been utilized by a company known as Builteco Sdn Bhd without the defendant's knowledge or consent in support of their application to the Pentadbir Tanah Kota Tinggi for a permit to remove sand. In the said application the plaintiff had falsely H stated in their joint venture agreement with Builteco that they had been awarded the dredging contract by the letter of award dated 1 October 2007 when the defendant says in fact such contract had never been awarded to the plaintiff (encl. 16 "ED20"). Further the defendant says that the plaintiff had applied for the I *ex parte* injunction surreptitiously although they had been notified by the defendant's solicitors by letter dated 21 February 2008 that the solicitors have been given instructions by the defendant

to accept service and be informed of any legal action that the plaintiff may file against the defendant (encl 16 "ED14"). Therefore counsel submits that the plaintiff has not come to court with clean hands (*Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd (supra)*).

[24] Counsel also refers to the plaintiff's application which sought to restrain the defendant from dumping dredged materials on third party dumping sites and also to compel the defendant to dump the said materials on the plaintiff's sites. It is submitted that the application is for a mandatory injunction. Counsel submits that the plaintiff's claim is based on the purported breach of the Dumping Contract. There are no special or exceptional circumstances to justify the grant of a mandatory injunction (*Sivaperuman v. Heah Seok Yeong Realty Sdn Bhd* [1978] 1 LNS 184; *Timbermaster Timber Complex (Sabah) Sdn Bhd v. Top Origin Sdn Bhd* [2002] 1 CLJ 566). On this issue counsel for the plaintiff concedes that the plaintiff is seeking both prohibitory as well as mandatory injunctions. However counsel submits that there is a *status quo* to be preserved and that the defendant must be required to dump the dredged materials on the plaintiff's sites. Counsel states that the balance of the dredged materials stands at less than 900,000 cubic metres and the defendant should be ordered to dump these materials on the plaintiff's sites. Further the plaintiff has made allegations of *mala fide* against the staff of the defendant (encl 2 "SE8") which allegedly shows the real reason why the defendant is breaching the Dumping Contract and the defendant has not rebutted this allegation.

[25] With regard to the test for the grant of a mandatory injunction counsel submits that the new approach is that the same test for the grant of an interlocutory injunction applies (*ESPL (M) Sdn Bhd v. Radio & General Engineering Sdn Bhd* [2004] 4 CLJ 674; *See Teow Guan & Ors v. Liquidators of Kian Joo Holdings Sdn Bhd (In Liquidation) & Ors* [2008] 1 CLJ 218).

[26] Counsel further states that there is no urgency in this matter because the plaintiff sat on this matter for four months before commencing action. The alleged wrongdoing was alleged to have occurred on 29 December 2007 but action was only taken in April 2008. This shows no urgency in this matter to warrant and therefore the *ex parte* injunction was rightly set aside. On this issue counsel for the plaintiff submits that there has been no delay in commencing the action against the defendant. On 29 December

A 2007 plaintiff was stopped from carrying on work. Correspondences were being exchanged between the parties till February 2008 and the writ was filed on 14 April 2008. Therefore was no delay. Even if there was any delay, such delay was not prejudicial to the defendant (*Larut Consolidated Bhd & Anor v. Khoo Ee Bee & Ors* B [1997] 5 CLJ 307; *Bandar Raya Developments Berhad v. Ang Yoke Lin Construction Sdn Bhd (supra)*).

Decision

C **[27]** The Court of Appeal in the case of *SV Beverages Holdings Sdn Bhd & Ors v. Kickapoo (Malaysia) Sdn Bhd* [2008] 4 CLJ 20 said as follows:

> The legal approach which the court should take in considering an application for interlocutory injunction as in this case was stated D by Lord Diplock in the *American Cynamid Co v. Ethicon Ltd* [1975] AC 396 at pp. 407-408:
>
> The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. It is no part of the court's function at this E stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the F introduction of the practice of requiring an undertaking as to damages upon the grant of an interlocutory injunction was that "it aided the court in doing that which was its great object, *viz*. abstaining from expressing any opinion upon the merits of the case until the hearing"; *Wakefield v. Duke of Buccleugh* [1985] 12 LT 628, 629. So unless the material available to the court at the G hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is H sought.
>
> As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he I would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure

> recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

In the earlier case of *Keet Gerald Francis Noel John v. Mohd Noor & Ors* [1995] 1 CLJ 293 Gopal Sri Ram JCA in his judgment said *inter alia*:

> We begin by respectfully accepting that the correct approach to be adopted and the stages of reasoning involved in the process of arriving at the conclusion as to whether interlocutory injunctive relief should be granted or withheld are those that have been neatly summarised by Hashim Yeop A. Sani J, (as he then was) in *Mohamed Zainuddin bin Puteh v. Yap Chee Seng* [1976] 1 LNS 76. This is what that very eminent Judge said in that case:
>
> > Firstly to discover whether the plaintiffs case is frivolous or vexatious. If it is not, then to decide in whose favour the balance of convenience lies. If these factors are evenly balanced it may not be improper for the Court to take into account any tipping in the balance as revealed by affidavits ... Secondly, if the plaintiffs were to succeed at the trial, whether they would be adequately compensated for the interim restriction on their activities which the grant of an interlocutory injunction would have imposed.
> >
> > The Judge then considers the balance of convenience, and if the relevant factors were evenly balanced the Court should grant an interlocutory injunction which would maintain the *status quo*. It is said that at that stage the Court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits. (The emphasis is ours.)

To summarise, a Judge hearing an application for interlocutory injunction should undertake an inquiry along the following lines:

first, he must ask himself whether the totality of the facts presented before him discloses a *bona fide* serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of Counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;

second, having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, *inter alia*, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the Judge would be entitled to dispense with the usual undertaking as to damages (see: *Cheng Hang Guan & Ors v. Perumahan Farlim (Pg) Sdn Bhd & Ors* [1988] 2 CLJ 35; [1988] 1 CLJ (Rep) 435. Apart from such cases, the Judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee;

thirdly, the Judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the *status quo*, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] AC 130 and applied in *Cheng Hang Guan (supra)*. It is a judicial discretion capable of

correction on appeal. Accordingly, the Judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A Judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

Similar principles relating to the grant of interlocutory injunction were enunciated by His Lordship Jemuri Serjan CJ (Borneo) in the case of *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461.

[28] The first question to be addressed is whether there are serious issues to be tried. From the evidence I find that the defendant is continuing with the dumping of dredged materials on to the plaintiff's site as per the Dumping Contract. The only dispute is whether all the dredged materials from the whole project must be dumped on to the plaintiff's sites. The other issue is whether the proceeds that the plaintiff derives from the sale of the dredged materials come within the contemplation of the Dumping Contract. As regards the Dredging Contract the plaintiff contends that a Dredging Contract has been concluded and therefore the revocation of the contract after its acceptance is null and void. The defendant contends that no such contract has been concluded. Having heard the submissions made and considered the evidence, I find that there are serious issues which merit further investigation. The serious issues are as follows:

(i) whether the Dumping Contract confers on the plaintiff exclusive rights over all the dredged materials from the whole project;

(ii) whether the defendant is in breach of the Dumping Contract by entering into another contract with SBB;

(iii) whether any loss sustained by the plaintiff from the sale of the dredged materials to third parties can be attributed to the defendant;

(iv) whether the plaintiff's letter "SE3" dated 5 December 2007 was received by the defendant on the same date or on 17 December 2007;

A (v) whether a Dredging Contract has been concluded between the parties;

(vi) whether the revocation of the Dredging Contract is null and void;

B (vii) whether the defendant's acknowledgment stamp on the letter "SE3" is a forgery.

[29] Having found that there are serious issues for trial the next question to be addressed is whether on a balance of convenience C the injunctive relief sought for should be granted. In *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors (supra)* the court said as follows:

> Now, once it is obvious that there are serious issues to be tried D the court must consider where the balance of inconvenience lies. In *American Cyanamid Co v. Ethicon Ltd (supra)*, Lord Diplock said at page 510 of the All ER report:
>
> On what should be taken into account in determining the balance of convenience, Lord Diplock in *American Cyanamid v. Ethicon* E had this to say:
>
> > It would be unwise even to attempt to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary F from case to case.
> >
> > The question to pose when considering the balance of justice is whether it is most just in all the circumstances that the relief sought for should be granted (*American Cyanamid Co v. Ethicon Ltd* [1975] AC 396). It is here that G the degree of protection that is afforded to the defendant by an undertaking of the plaintiff as to damages is often important. The court must have regard to any prejudice or injury that may be suffered through the grant or refusal of the interlocutory relief pending the hearing and the court too H must have regard to the extent to which, if no interlocutory injunction is issued, it will be possible at the final hearing to compensate or provide for breaches that have already taken place. So, it is appropriate to say that the question of hardship is important and it is a relevant consideration. The court will determine the balance of justice between the I parties in granting or refusing relief.

Damages

[30] On the issue of whether the plaintiff will be adequately compensated by damages if an injunction is refused, I am of the view that any financial loss that it may suffer are monetary in nature. The defendant has not denied its contractual obligations to dump 2,000,000 cubic metres of dredged materials onto the plaintiff's sites. Progress payments are being made. Losses related to the Dumping Contract, if any, will be the plaintiff's loss of proceeds from the sale of the balance of 900,000 cubic metres of the approximately 2.9 million cubic metres of dredged material from the whole project. The defendant disputes this claim and says that the sale of dredged materials by the plaintiff to third parties is beyond the scope of the Dumping Contract. In my opinion even if at the trial the court agrees with the plaintiff, such loss can be quantified. The plaintiff sells the dredged materials at RM10 per cubic matre. The defendant has submitted that records are kept of materials dredged and dumped and such records can be obtained through the process of discovery. In my opinion the plaintiff's financial loss, if any, would be monetary in nature and can be adequately compensated by damages. There is no issue raised as to the defendant's capacity to pay. The court will decline to grant an injunction where monetary compensation is an adequate remedy *(Perbadanan Setiausaha Kerajaan Selangor & Ors v. Metroway Sdn Bhd & Another Appeal (supra))*. On the other hand if an injunction is granted there is a possibility of disruption of work. The losses suffered by the defendant will be greater. The defendant will sustain damage from any disruption or delay in the project works. Such losses and damage may be more than what the plaintiff will sustain if an injunction is refused. It is imperative that the defendant be allowed to carry out its contractual obligations with JPS without disruptions. In the circumstance I find that the grant of an injunction will cause greater injustice to the defendant.

Interlocutory Mandatory Injunction

[31] A perusal of the reliefs sought for in the application shows that granting the application will in effect give to the plaintiff the majority of the reliefs sought for in the statement of claim. The plaintiff essentially wants to compel the defendant and its agents to perform the Dumping Contract and to prohibit the defendant from continuing with its contract with SBB. The plaintiff also

A seeks to prohibit the defendant or its agents from carrying out dredging works. Counsel for the plaintiff submits that the test for an interlocutory injunction applies also to a mandatory interlocutory injunction. Counsels submissions is partly correct. But a reference to case authorities show that for an application for a B mandatory or prohibitory interlocutory injunction persuasive reasons must be shown. On this issue Abdul Malek b Ishak J (as he then was) said in the case of *Aramin Sdn Bhd v. Juta Rasmi (M) Sdn Bhd* [2005] 2 CLJ 620 as follows:

C > On perusal of encl. 5, what the plaintiff seeks is for an interlocutory mandatory injunction and so it may be argued that the ordinary *American Cyanamid* principles are not applicable. This immediately brings to mind the case of *Shepherd Homes Ltd v. Sandham* [1970] 3 All ER 402 at 412 where Megarry J said:
>
> D In a normal case the court must, *inter alia*, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.
>
> This is now known as the Megarry J's test and it has since been E approved by the English Court of Appeal in the case of *Locabail International Finance Ltd v. Agroexport and Others The Sea Hawk* [1986] 1 All ER 901. There the English Court of Appeal said at p. 906 of the report:
>
> F the statement of principle by Megarry J in relation to the very special case of the mandatory injunction is not affected by what the House of Lords said in the *Cyanamid* case. The matter before the court is not only an application for a mandatory injunction, but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed G in the action. Such an application should be approached with caution and the relief granted only in a clear case.

In the case of *See Teow Guan & Ors v. Liquidators of Kian Joo Holdings Sdn Bhd (In Liquidation) & Ors (supra)* the Court of Appeal followed the case of *Sivaperuman v. Heah Seok Yeong Realty* H *Sdn Bhd (supra)* when the court said as follows:

> The applicants' prayer here for a restraining order, of the liquidators whether by themselves or by their servants or otherwise, of disposing the shares was in effect and substance an I interlocutory injunction. In fact the very motion had alluded to that terminology. Bearing in mind the prohibitive nature of this order,

as said above unless persuasive reasons were supplied, the motion was doomed to fail. In *Sivaperuman v. Heah Seok Yeong Realty Sdn Bhd* [1978] 1 LNS 184 the Federal Court had held that:

> The first is that it is couched in prohibitory terms restraining the appellant until the trial of the suit from remaining in the quarters but it is in effect a mandatory injunction. Equity looks to the substance and intent and not to the form, and the interlocutory injunction sought and granted although prohibitory in language is mandatory in substance and effect (*Shepherd Homes Ltd v. Sandham* (at p. 359); *Hounslow Local Borough Council v. Twinckenham Garden Developments Ltd* (at p. 570-1) and as I said in my judgment in *Wah Long (Jelapang) Tin Mine Sendirian Berhad v. Chai Nyen Yiok*, **an interim or interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases** (emphasis added).

In the later case of *Marina Mohd Yusoff v. Pekeliling Triangle Sdn Bhd & Other Appeals* [2008] 1 CLJ 169 the Court of Appeal said *inter alia* "in the instant case the remedy which PTSB seeks against MY includes delivery of possession of the said lands and building which in substance is a mandatory interlocutory injunction. Such injunctions are granted on the same basic principles as are prohibitory injunctions, namely there is a question to be tried and the balance of convenience. However in addition the plaintiff, in order to succeed, has to show that his case has a higher probability of success at the trial of the action. This test was adopted in *Timbermaster Timber Complex (Sabah) Sdn Bhd v. Top Origin Sdn Bhd* [2002] 1 CLJ 566 following the English Court of Appeal case of *Locabail International Finance Ltd v. Agroexport* [1986] 1 All ER 901 (see also *MBf Holdings Berhad v. East Asiatic Company (Malaysia) Berhad* [1995] 4 CLJ 73). The rationale given for this different approach is that in the case of a mandatory interlocutory injunction the plaintiff will in substance obtain the reliefs that he seeks in the main action."

[32] Based on the aforementioned authorities the court needs to consider how, in the circumstances of the present case, the interests of the parties may best be protected and the question of hardship and inconvenience that may arise. The court has also to consider the degree of probability that the applicant will ultimately succeed at the final hearing. I am also mindful of what has been said by Lord Diplock in his judgment in *American Cyanamid v. Ethicon (supra)* which was cited by the Supreme Court in the case of *Tien Ik Sdn Bhd & Ors v. Peter Kuok Khoon Hwong* [1993] 1 CLJ 9 as follows:

A It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial ...

B

[33] One of the foremost consideration in this case is that it involves a public interest project. In *SV Beverages Holdings Sdn Bhd & Ors v. Kickapoo (Malaysia) Sdn Bhd (supra)* the court said "There is another important fact which, to our mind, must also be C taken into account in considering where the balance of justice lies in this case. It is the public interest. Public interest is always a relevant consideration in granting specific relief, (see *Tenaga Nasional Bhd v. Dolomite Industrial Park Sdn Bhd* [2000] 1 CLJ 695, *Timbermaster Timber Complex (Sabah) Sdn Bhd v. Top Origin Sdn* D *Bhd* [2002] 1 CLJ 566, *Keet Gerald Francis Noel John v. Mohd Noor & Ors* [1995] 1 CLJ 293)." I take judicial notice that this project is to alleviate the flood problems that had occurred in the Kota Tinggi district which had caused so much suffering, inconvenience and financial loss to the public affected by the floods. It is E imperative that this project be allowed to be carried out and works to proceed unhindered till completion. Therefore the defendant has to be allowed to carry out its contractual obligations with JPS and to proceed with the completion of the project according to schedule. In my opinion such interest F overrides the dispute between the plaintiff and the defendant.

[34] As regards the police reports and the allegation of *mala fide* made by the plaintiff I find that the defendant has categorically denied the allegations (encl 16 para 52). On the issue of delay I G accept the explanation by the plaintiff and I find that there was no unreasonable delay in the filing of this action.

[35] Having considered the circumstances of this case and the authorities I find that the balance of convenience lies against the granting of the interim injunction. I find that the plaintiff has failed H to show persuasive reasons for the court to grant the mandatory and prohibitory injunctions sought for. For the aforementioned reasons I exercised my discretion in favour of the defendant and dismissed the plaintiff's application with costs.

I

[36] The plaintiff has also appealed against my decision allowing the defendant's objection and rejecting a further affidavit filed on 3 June 2008 (encl 18). The affidavit was filed in the midst of submissions and is in reply to two affidavits filed by the defendant on the day the court commenced to hear submissions. The plaintiff, having been given time to study the affidavits, chose to proceed with submissions. The plaintiff has completed their submissions and the defendant was in the midst of their submissions but due to time constraints proceedings had to be postponed and continued on another date. On the day before the continuation of submissions the plaintiff filed the affidavit encl. 18. It was served on the defendant's counsel on the day for continuation of submissions. The defendant objected and relied on the case of *Lum Choon Realty Sdn Bhd v. Perwira Habib Bank Malaysia Bhd* [2003] 3 CLJ 791 wherein the Court of Appeal said "As such in our view when parties begin their submissions the evidence by way of affidavits is deemed to be closed and the parties are only allowed to submit on the evidence as found in the various affidavits."

[37] Counsel for the plaintiff submits that encl. 18 is in reply to certain material evidence alluded to in the defendant's affidavits. But due to urgency of the matter the plaintiff chose to proceed with submissions. Counsel states that if encl. 18 is not allowed then material evidence will not be placed before the court. On this issue I take note that the plaintiff's counsel, having been allowed time to peruse the affidavits filed by the defendant, chose to proceed with submissions. No request was made for leave to reply to the defendant's affidavits and neither did counsel notify the court that they wished to reserve their right to reply to the affidavits. Having exercised their option I am of the opinion that it was improper for the plaintiff to assume that they are at liberty to file encl. 18 in the midst of their submissions without notice to the defendant or to the court. Therefore I allowed the defendant's objections on encl. 18.